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3
   Plaintiff in pro per
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FILED

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RICHARD W. WIEKING
CLERK
U.S. DISTRICT COURT
NO. DIST. OF CA. S.J.

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8   UNITED STATES DISTRICT COURT

9   NORTHERN DISTRICT OF CALIFORNIA

10   SAN JOSE DIVISION

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13 James Alan Bush,   ) Case No.: C 08-01354 (RS) JF
)
14   Petitioner,   ) MEMORANDUM OF POINTS AND
) AUTHORITIES IN SUPPORT OF
15   v.   ) PLAINTIFF'S PETITION FOR
) DECLARATORY AND INJUNCTIVE RELIEF
16 Crime Scene Investigator James   ) FOR FAILURE TO MAINTAIN RECORDS
    Anton, Officer Benjamin Holt,   ) PROPERLY
17 Lieutenant Carl Rushmeyer,   )
    Lieutenant Vierra, Officer Jon   ) [Title 42 U.S.C.S. § 1983 and
18 Marines, Officer Christopher   )   Civ. Code § 1798.45(b), (c)]
    Fontaine, Officer Michael (aka   )
19 "Mick") Rose, Officer Devon   )
    Klein, and Sunnvyale Department   ) Judge Jeremy Fogel
20 of Public Safety,   )
)
21   - and -   )
)
22 Long (aka "Kevin") Cao, Daniel   )
    Napolitan, Daniel Cortez,   )
23 Laurene Weber, Robert Bradford   )
    (aka "Malnburg, Jr."), Jonathan   )
24 Harrington, Josh Williams,   )
)
25   Respondents.   )
   _____)
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STATUTES

2   **Statute of Limitations.** An action against a state agency brought

3   pursuant to Civ. Code §§ 1798.18, 1798.45(b), (c), 1798.48 for failure to

4   properly maintain records may be brought within two years from the date

5   on which the cause of action arises, except that when a defendant has

6   materially and willfully misrepresented any information required under

7   Civ. Code § 1798.49 to be disclosed to an individual who is the subject

8   of the information and the information so misrepresented is material

9   to the establishment of the agency's liability to that individual under

10   Civ. Code § 1798.49, the action may be brought at any time within two

11   years after discovery by the complainant of the misrepresentation [see

12   Civ. Code § 1798.49].

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CASE LAW

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15   I.   THE PLAINTIFF IS ENTITLED TO DAMAGES BECAUSE THE DEFENDANT HAS

16   FAILED TO PROPERLY MAINTAIN ITS RECORDS WHICH CONTAIN INFORMATION

17   CONCERNING THE PLAINTIFF.

18   A.   Agency's Duty to Properly Maintain Records. Each agency shall

19   maintain all records, to the maximum extent possible, with

20   accuracy, relevance, timeliness, and completeness when the

21   records are used to make any determination about the individual

22   (*see* Civ. Code § 1798.18).

23   B.   Only Relevant Information May Be Maintained. Each agency

24   shall maintain in its records only personal information that

25   is relevant and necessary to accomplish a purpose of the

26   agency required or authorized by the California Constitution

1   or statute, or mandated by the federal government (Civ. Code

2   § 1798.14).

3   C.   Damages for Improper Maintenance. In any suit brought

4   for failure to properly maintain information used in a

5   determination or other violation of the Information Practices

6   Act (Civ. Code §§ 1798-1798.78), the agency shall be liable to

7   the individual for the sum of actual damages sustained by the

8   individual, including damages for mental suffering, and the

9   costs of the action together with reasonable attorney's fees as

10   determined by the court (Civ. Code § 1798.48).

11   II. THE DEFENDANT AGENCY IS MAINTAINING INFORMATION IN ITS RECORDS

12   DESCRIBING PLAINTIFF'S ACTIVITIES IN THE EXERCISE OF HIS RIGHTS

13   GUARANTEED BY THE FIRST AMENDMENT, IN VIOLATION OF 5 U.S.C.S.

14   § 552a(e)(7).

15   A.   Maintenance of Information on First Amendment Activities

16   Prohibited. An agency that maintains a system of records shall

17   maintain no record describing how any individual exercises

18   rights guaranteed by the First Amendment unless expressly

19   authorized by statute or by the individual about whom the

20   record is maintained or unless pertinent to and within the

21   scope of an authorized law enforcement activity (see 5 U.S.C.S.

22   § 552a(e)(7)).

23   B.   Detrimental Effect on Plaintiff. Allegation of a system

24   of independently unlawful intrusions, accumulation and

25   dissemination of inaccurate information, damage to reputation

26   and business are sufficient to establish that defendant's

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1   conduct had a detrimental effect on the plaintiff, so that a

2   civil action regarding violation of 5 U.S.C.S. § 552a(e)(7) may

3   be maintained (Jabara v. Kelley (E.D. Mich. 1979) 476 F. Supp.

4   561, 568, 580, rev'd on other grounds, Jabara v. Webster (6th

5   Cir. 1982) 691 F.2d 272, 280).

6 III. THE COURT SHOULD ORDER DEFENDANT TO AMEND ITS RECORDS CONCERNING

7   PLAINTIFF AS PLAINTIFF HAS REQUESTED OR TO INCLUDE PLAINTIFF'S

8   STATEMENT OF DISAGREEMENT WITH THE RECORDS WITHIN THE RECORDS

9   IN QUESTION BECAUSE PLAINTIFF IS ENTITLED TO SUCH AMENDMENT OR

10   INCLUSION OF A STATEMENT UNDER THE INFORMATION PRACTICEWS ACT OF

11   1977.

12   A.   Request for Amendment of Record. Each agency must permit an

13   individual to request in writing an amendment of a record

14   and shall within 30 days of receipt of such request make

15   each comtion in accordance with the individual's request,

16   of any portion of a record that the individual believes is

17   not accurate, relevant, timely, or complete, and inform the

18   individual of the corrections made; or inform the individual

19   of its reason for refusing to amend the record, and provide

20   the individual with an opportunity to request review of

21   the refusal. If, after review, the agency makes a final

22   determination not to make the requested amendment, the agency

23   shall permit the individual to file with the record a statement

24   of disagreement and shall on any subsequent disclosure clearly

25   note the disputed portion of the record, and make available

26   to any receiving party both the individual's statement of

1   disagreement and its own statement of its reasons for refusing

2   to make the amendment (see Civ. Code §§ 1798.35-1798.37).

3   B.   Relief by Writ of Mandate for Abuse of Discretion. A writ of

4   mandate issued persuant to Code Civ. Proc. §§ 1085, 1086 is

5   proper to control abuse of discretion by an administrative

6   agency (Manjares v. Newton (1966) 64 W. 2d 365, 370, 49 Cal.

7   Rptr. 805, 411 P.2d 901; see Code Civ. Proc. §§ 1085, 1086).

8   C.   Injunction Against Agency. Any agency that fails to comply with

9   any provision of the Information Practices Act of 1977 (Civ.

10   Code §§ 1798-1798.78) may be enjoined by any court of competent

11   jurisdiction. The court may make such judgment or order as is

12   necessary to prevent the use of or employment by an agency of

13   any practices that violate the Information Practices Act of

14   1977. Actions for injunction may be brought by any individual

15   acting in his or her own behalf (Civ. Code § 1798.47).

16   D.   Amendment Is Proper Remedy for Improperly Maintained Records.

17   Although an agency is not required to amend its records merely

18   because an individual requests it, an agency my be compelled to

19   amend records used as a basis of a determination concerning the

20   &e&d individual, including information that is not maintained

21   with such accuracy, relevance, timeliness, and completeness as

22   is reasonably necessary to assure fairness to the individual

23   in making the determination (see Savarese v. United States

24   Dep't of Health, Educ. & Welfare (N.D. Ga. 1979) 479 F. Supp.

25   304, 306-307, aff'd, (5th Cir. 1980) 620 F.2d 298). The provisions

26   of the Privacy Act interpreted by Savarese are comparable to

1   analogous provisions of the Information Practices Act (*compare*

2   5 U.S.C.S. § 552a(d)(2), (3) (amendment), (e)(5) (improper

3   maintenance) *with* Civ. Code §§ 1798.18 (improper maintenance),

4   1798.35-1798.37 (amendment).

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